Washington University Journal of Law & Policy

Volume 64 *The Legal Impacts of COVID-19*

2021

"Yes Harm, No Foul": Recalibrating Qualified Immunity

Noah Watson
Washington University School of Law

"YES HARM, NO FOUL": RECALIBRATING QUALIFIED IMMUNITY

Noah Watson*

ABSTRACT

The current state of qualified immunity allows victims' constitutional rights to be violated but not vindicated. The judicially created doctrine of qualified immunity has been strongly supported by the Supreme Court. Recently, opposition has increased from legal commentators, members of Congress, and judges across political and ideological lines. This Note analyzes qualified immunity and proposes bringing the doctrine back in line with its common-law foundation. Watson proposes reinstating the original applicability of § 1983 and returning to a common-law understanding of qualified immunity. Watson advocates for keeping officials accountable while protecting officials from burdensome litigation, and better serving justice for those whose rights have been violated.

* J.D. (2020), Washington University School of Law.

INTRODUCTION

On July 15, 2012, at 1:30 a.m., Andrew Lee Scott was home watching TV with his girlfriend, Miranda Mauck.[1] Someone banged on the door, alarming Andrew and Miranda.[2] Andrew retrieved his gun and investigated.[3] When he opened the door, a hidden figure drew its weapon and opened fire.[4] Andrew was shot several times and fell to the floor—dead.[5]

The unannounced, hidden figure was a police officer looking for a person other than Andrew, but the officer was at the wrong house.[6] In fact, the officer didn't even have a search warrant for the correct house.[7] Nor did he indicate he was law enforcement before firing; he did not use emergency lights or make an identifying statement.[8]

An innocent man left dead in his own home.

Nevertheless, the officer evaded liability. The Eleventh Circuit Court of Appeals upheld the district court's ruling that gave the officer immunity because his actions did not violate "clearly established law."[9] In legal terms, it granted the officer qualified immunity.

The Supreme Court strongly supports qualified immunity, a judicially created doctrine. In recent years, the Court has sent a clear message: There should be fewer lawsuits against government officers, specifically law enforcement.[10] The Court's emphasis on qualified immunity has "been

1. Ludmilla Lelis, *Federal Lawsuit Filed Against Lake Sheriff for Andrew Lee Scott Shooting Death*, ORLANDO SENTINEL, (Mar. 6, 2013), http://articles.orlandosentinel.com/2013-03-06/news/os-andrew-scott-shooting-lawsuit-20130306_1_andrew-lee-scott-leesburg-man-shot-excessive-force [https://perma.cc/2HPA-HJ5L].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. David French, *End Qualified Immunity*, NATIONAL REVIEW (Sept. 13, 2018), https://www.nationalreview.com/2018/09/end-qualified-immunity-supreme-court/ [https://perma.cc/BR57-ZWS9].
7. *Id.*
8. *Id.*
9. Young v. Borders, 620 F. App'x 889 (11th Cir. 2015) (per curium); *see also* Young v. Borders, No. 5:13-cv-113-Oc-22PRL, 2014 WL 11444072 (M.D. Fla. Sept. 18, 2014).
10. Noah Feldman, *Supreme Court has had Enough with Police Suits*, BLOOMBERG OPINION, (Jan. 9, 2017), https://www.bloomberg.com/view/articles/2017-01-09/supreme-court-has-had-enough-with-police-suits [https://perma.cc/JGM7-T5LW].

emphatic, frequent, longstanding, and nonideological."[11] But modern qualified immunity has come under increasing pressure from legal commentators,[12] members of Congress,[13] judges,[14] and even Justices on the Court.[15] Just as the Court's embrace of qualified immunity has been nonideological, the growing chorus of voices opposed to modern qualified immunity is undefined by politics or ideology.

Modern qualified immunity is too broad for its intended purposes and fails to secure justice for people like Andrew Lee Scott. This Note proposes that Congress and the Supreme Court work together to bring qualified immunity into check and back in line with its common-law foundation.

Part I of this Note follows the history of 42 U.S.C. § 1983 and qualified immunity. Starting with the passage of § 1983, it discusses the Court's role in expanding federal jurisdiction over civil-rights suits and the Court's creation of qualified immunity. It then examines the Court's myriad explanations for adopting and strengthening qualified immunity.

Part II analyzes the impact of two of the Court's most influential cases involving § 1983 and qualified immunity. It first considers the Court's interpretation of § 1983's scope and suggests that the Court created a new understanding of § 1983 almost a century after it was passed into law. Then,

---

11. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1858 (2018). Unanimous qualified-immunity decisions have been authored by Chief Justice Roberts and Justices Sotomayor, Alito, Ginsburg, and Thomas. *Id.*

12. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018) (concluding that qualified immunity "lacks legal justification, and the Court's justifications are unpersuasive"); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 76 (2017) [hereinafter Schwartz, *How QI Fails*] (reasoning that "available evidence indicates that qualified immunity often is not functioning as [the Court] assumed, and is not achieving its intended goals").

13. A bill was offered in the United States House of Representatives to do away with qualified immunity in the wake of George Floyd's death at the hands of Minneapolis police officers. The bill is sponsored by a tri-partisan group of sixty-five Representatives. Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020). And two competing bills have been offered in the Senate. Ending Qualified Immunity Act, S. 4142, 116th Cong. (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020).

14. *See, e.g.*, Zadeh v. Robinson, 902 F.3d 483, 498 (2018) (Willett, J., concurring dubitante) ("To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonably—as long as they were the *first* to behave badly.").

15. *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) ("[The Court's] one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment."); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring in part and concurring in judgment) ("[O]ur analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act . . . . In an appropriate case, we should reconsider our qualified immunity jurisprudence.").

it examines the Court's formulation of modern qualified immunity and asserts that the Court has drifted far from common-law principles and should return to the original understanding of qualified immunity.

I. HISTORY

In 1868, the United States ratified the Fourteenth Amendment to the Constitution.[16] The Fourteenth Amendment was adopted after the Civil War to guarantee the rights of former slaves and fight the racial injustices of Black Codes—slavery by another name.[17] To achieve these goals, the amendment gave Congress the "power to enforce, by appropriate legislation, the provisions of" the amendment.[18] Congress used this power to enact section 1 of the Ku Klux Klan Act of 1871.[19] It allowed all citizens to sue a government agent for violating their rights, but it was predominately passed to allow former slaves to vindicate their newly found constitutional and legal rights.[20]

The modern successor to the Act is 42 U.S.C. § 1983.[21] Section 1983 allows anyone who has been deprived "of any rights, privileges, or

16. Amendment XIV, Section 1 provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

17. Nelson Lund, *Living Originalism: The Magical Mystery Tour*, 3 TEX. A&M L. REV. 31, 42 (2015). Black Codes provided a pittance of basic rights (e.g., marriage and ownership) to the formerly enslaved Americans in an attempt to skirt constitutional issues but denied them most other rights, "including the right to bear arms, to serve on juries, to vote, to testify against whites in court, to quit their jobs while under contract, and to move about without proof of a labor contract with some employer." James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 436 (2018).

18. U.S. CONST. amend. XIV § 5.

19. Ku Klux Klan Act, ch. 22, 17 stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2017)). Since 1871, the cause of action now codified at § 1983 has been in several different locations in the United States Code. I will thus refer to the various iterations of the legislation as § 1983 throughout this Note even if the statute was, at the time, located elsewhere.

20. Howard M. Wasserman, *Teaching Civil Rights: Civil Rights and Federal Courts: Creating a Two-Course Sequence*, 54 ST. LOUIS U.L.J. 821, 821 (2010); *see, e.g.*, CONG. GLOBE, 42nd Cong., 1st Sess. 505 (1871) (statement of Sen. Pratt) ("Though called citizens of the United States, nobody can doubt that special reference was had to those who had been heretofore slaves. It was not needed that these provisions should be made for the white race, whose citizenship had never been in doubt.").

21. Wasserman, *supra* note 20.

immunities secured by the Constitution and laws" to bring suit against anyone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State."[22] Although the statute does not explicitly mention any immunities,[23] the Supreme Court has carved out a broad qualified immunity that shields government officials who have not violated "clearly established law."[24]

The first major shift in § 1983 doctrine occurred almost one hundred years after its enactment when the Supreme Court decided *Monroe v. Pape*.[25] In *Monroe*, thirteen Chicago police officers entered Monroe's home without a search warrant, "routed [his family] from bed, made them stand naked in the living room, . . . ransacked every room," and arrested him.[26] The officers were not acting pursuant to any Illinois statute, ordinance, regulation, custom, or usage,[27] but Monroe sued in federal court under § 1983.[28] The question was whether § 1983's "under color of any [state law]" language allowed suits against state officials who deprived an individual of rights *in violation of* state law or whether the language limited suits to cases where officials acted *in accordance with* "state law, state custom, or state

22. 42 U.S.C. § 1983 (2018). The full statute reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

An equivalent cause of action against federal officers was created by common law in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Although the two actions have different origins, the Supreme Court analyzes qualified immunity identically under *Bivens* and § 1983. *See* Wilson v. Layne, 526 U.S. 603, 609 (1999) ("[U]nder both § 1983 and *Bivens*, the qualified immunity analysis is identical . . . .").

23. Imbler v. Pachtman, 424 U.S. 409, 417 (1976) (explaining that § 1983 "on its face admits no immunities").

24. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

25. Monroe v. Pape, 365 U.S. 167 (1961).

26. *Id.* at 169.

27. *Id.* at 172.

28. *Id.* at 169.

usage."[29] The *Monroe* Court chose the former construction—opening the federal courts to a greater number of potential litigants whose rights were violated by state officials even when the state official violated state law.[30]

The Court again made a major shift in *Harlow v. Fitzgerald* and crafted the modern qualified-immunity test.[31] Before *Harlow*, qualified immunity had a subjective and objective prong, both had to be met for the defendant to be granted qualified immunity.[32] The subjective prong of the pre-*Harlow* test denied qualified immunity if an official "took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury."[33] Because of the difficulty and litigation costs of proving subjective intent, the Court argued that denying qualified immunity based on officials' subjective good faith imposed substantial costs on officials such as distracting them from their duties, inhibiting officials' discretion, and deterring qualified citizens from serving.[34] Then, the Court announced the modern qualified-immunity test, which contains only an objective prong: State-government officials "generally are shielded . . . insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known."[35]

Next, in *Pearson v. Callahan*, the Court set forth the most recent piece of qualified-immunity doctrine.[36] In *Pearson*, Callahan gave an undercover police informant consent to enter his home to buy methamphetamine.[37] After the purchase and while still in the home, the informant signaled the task force, which entered Callahan's home and arrested him.[38] He was

29. *Id.* at 172.
30. *Id.* at 187. *But see id.* at 237 (Frankfurter, J., dissenting) (arguing that legislative history, litigation history, and the plain language all "converge[] to the conclusion that . . . [§1983 is] enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom, or usage' sanctioned the grievance complained of"); *see* George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 964 (2003) (reasoning that the *Monroe* majority interpreted "under color of" broadly to define any state action so "there was no need to embark upon the difficult and fact-intensive inquiry into whether the state officials had created their own customary form of state law").
31. Harlow v. Fitzgerald, 457 U.S. 800 (1982).
32. *Id.* at 815.
33. *Id.* (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).
34. *Id.* at 816.
35. *Id.* at 818 (emphasis added).
36. Pearson v. Callahan, 555 U.S. 223 (2009).
37. *Id.* at 227–28.
38. *Id.*

charged with unlawful possession and distribution of methamphetamine.[39] The Court reasoned that the "consent-once-removed" doctrine, which allows police to enter a house when an informant gains consent, was widely accepted by lower courts, so the task force reasonably relied on that doctrine even though it violated the Fourth Amendment.[40] It held that the qualified-immunity inquiry "turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'"[41] Furthermore, and most importantly, the Court allowed lower courts to first determine if there was a violation of clearly established law, and then, if there was, ask whether there was a constitutional violation.[42] Thus, if a court decides to grant qualified immunity because there is no violation of clearly established law, it may never answer whether there was a constitutional violation.

Qualified immunity has been described as "the most important doctrine in the law of constitutional torts."[43] Given the doctrine's importance, one might assume that the Supreme Court has strong justifications for creating the doctrine despite the fact that Congress did not set forth any immunity in § 1983's text. In upholding the doctrine, the Supreme Court has proffered practical concerns and four legal theories: common-law good faith, equilibrium adjustment,[44] lenity, and stare decisis.

A. Practical Concerns

The Supreme Court's practical justifications for qualified immunity rest on balancing "two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[45]

Originally, the Court focused on shielding officials from financial

39. *Id.*
40. *Id.* at 244.
41. *Id.* (quoting Wilson v. Layne, 526 U.S. 603, 614 (1999)).
42. *Id.* at 239.
43. John C. Jefferies, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010).
44. *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011) (describing equilibrium adjustment as "a judicial response to changing" circumstances "to restore the prior equilibrium").
45. Pearson, 555 U.S. at 231.

liability.[46] The Court explained that a "policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[47] Protecting officials from financial liability is consistent with qualified immunity's application because the doctrine does not extend to "municipalities, . . . some private actors, and claims for injunctive or declaratory relief."[48]

Fifteen years after first expressing concern with financial liability, however, the Court emphasized broader practical concerns for qualified immunity. *Harlow* identified three costs other than financial liability that qualified immunity protects officials from.[49] These concerns are: distracting officials from public issues, deterring citizens from accepting public office, and causing officers to be less likely to fulfill their duties.[50] And in a pair of cases from 2009, the Court added yet another concern supporting qualified immunity: Avoiding "disruptive discovery [in litigation]," the Court claimed, was the "basic thrust of the qualified-immunity doctrine"[51] and the "'driving force' behind" the doctrine's creation.[52]

Thus, the practical concerns animating qualified immunity are (1) shielding officials from financial liability, (2) allowing officials to focus on public issues, (3) supporting citizens who wish to accept public office, (4) encouraging officials to fulfill their duties, and (5) protecting potential litigants from the burdens of discovery.[53]

---

46. Schwartz, *How QI Fails*, *supra* note 12, at 13. *But see* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U.L. REV. 885, 936–37 (2014) [hereinafter Schwartz, *Police Indemnification*] (emphasizing that between 2006 and 2011, officers in the "largest jurisdictions . . . were personally responsible for just .02% [of damages] . . . in police misconduct suits" and, in small and mid-sized departments, her study showed that officers "paid nothing towards settlements and judgments entered against them").

47. Pierson v. Ray, 386 U.S. 547, 555 (1967).

48. Schwartz, *How QI Fails*, *supra* note 12, at 13 (citing Pearson, 555 U.S. at 242 (municipalities); Richardson v. McKnight, 521 U.S. 399, 412 (1997) (private prison guards); Wood v. Strickland, 420 U.S. 308, 315 n.6 (1975) (equitable relief)).

49. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

50. *Id.*

51. Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009).

52. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

53. *Cf.* John C. Jefferies, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 99–100 (1999) (arguing that qualified immunity, by "reduc[ing] government's incentives to avoid constitutional violations[,]" allows courts to "embrace [constitutional] innovation" and thus increase rights protection). *But see supra* text accompanying notes 36–42 (arguing that *Pearson* allows courts to avoid answering constitutional questions).

B. Common-Law Good-Faith Defense

Before § 1983 or *Bivens* actions,[54] constitutional-rights violations were brought via state common-law claims.[55] For example, when citizens believed that their Fourth Amendment rights had been violated, they would bring a state action for trespass against the federal agent.[56] Then, the agent would claim federal supremacy to trump the state-law trespass.[57] Finally, citizens would assert that any federal power was void because of the Fourth Amendment's limitation on federal power.[58] Section 1983 fundamentally transformed and simplified the morass and allowed citizens to bring suit directly against state agents for rights violations. But this shift raised questions about how the new statutory right worked with the old common-law system or if the old system had any role at all.[59]

In 1967, the Supreme Court, relying on the common law, declared for the first time that government officials were entitled to qualified immunity.[60] In *Pierson v. Ray*, a group of "orderly and polite" African American clergymen was arrested in 1961 in Jackson, Mississippi, for entering a white-only waiting room at a bus terminal.[61] The arrests were made under a Mississippi statute that was found to be unconstitutional in 1965—four years after the incident.[62] The Supreme Court equated the officers' unconstitutional arrests to tort liability for false arrest and thus extended "the defense of good faith and probable cause . . . to [the officers] in the action under § 1983."[63] In other words, the common law required "excusing [the officers] from liability for acting under a statute that [they] reasonably believed to be valid but that was later held unconstitutional."[64]

Pierson specifically applied Mississippi common law in its analysis, but

54. *See supra* note 22 for a discussion of *Bivens*.
55. Baude, *supra* note 12, at 51.
56. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506 (1987).
57. *Id.*
58. *Id.*
59. Baude, *supra* note 12, at 52.
60. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) [hereinafter Schwartz, *Case Against QI*]; Pierson v. Ray, 386 U.S. 547, 554 (1967).
61. Pierson, 386 U.S. at 554 .
62. *Id.* at 550.
63. *Id.* at 557.
64. *Id.* at 555.

the Court has since taken a more encompassing approach and stated that qualified immunity is based on common-law defenses more broadly available in 1871—when Congress passed § 1983.[65] In a 2012 case, *Filarsky v. Delia*, the Supreme Court again pointed to the common law to justify qualified immunity and extended its reach to private individuals hired temporarily or for a specific purpose by the government.[66] The Court emphasized the applicability of common-law defenses available at the time § 1983 was passed:

> Our decisions have recognized similar immunities under § 1983, reasoning that common law protections "'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of § 1983."[67]

Thus, the Court relies on the traditional understanding of common law—that is, the common law as it stood in 1871.[68] While the Court has often offered common law as qualified immunity's base, it has conceded "that the precise contours of official immunity . . . [are not] derived from the often arcane rules of the common law."[69] Instead, a move from the common law "was justified by . . . special policy concerns."[70]

---

65. Schwartz, *Case Against QI*, *supra* note 60, at 1801.

66. Filarsky v. Delia, 566 U.S. 377, 393–94 (2012); *see also* Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (extending qualified immunity to executive branch officials).

67. Filarsky, 566 U.S. at 383–84.

68. Baude, *supra* note 12, at 54. *But cf.* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 60–61 (1989) (reasoning that the Court has provided a "quite creative construction of § 1983's text and history" and "pretended that only its chosen interpretation is consistent with § 1983's text and history" even though "an opposite reading of § 1983 is perfectly possible: The plain meaning of the statute's explicit language implies an expansive liability with no common law defenses").

69. Anderson v. Creighton, 483 U.S. 635, 644–45 (1987).

70. Wyatt v. Cole, 504 U.S. 158, 170–71 (1992) (Kennedy, J., concurring) (construing Anderson, 483 U.S. at 645); *see supra* text accompanying notes 45–53.

C. Equilibrium Adjustment

The equilibrium-adjustment theory is rooted in Justice Scalia's dissent in *Crawford-El v. Britton*.[71] The Court engages in equilibrium adjustment when it attempts to correct the effects of a faulty, old doctrine by inventing a new one, instead of simply fixing the old doctrine.[72] In *Crawford-El*, Scalia stated that "qualified immunity under § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted."[73] Nevertheless, Scalia did not suggest revising qualified immunity to align with common-law immunities; instead, he declared that the abandonment of common-law principles was "perhaps just as well."[74] He justified this approach by arguing that the Court's 1961 decision in *Monroe v. Pape*[75] altered § 1983 so greatly that it "bears scant resemblance to what Congress enacted almost a century" before the decision.[76] Scalia contended that the Court broadened § 1983 and "changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal courts tens of thousands of suits each year."[77] It was now up to the Court to engage "in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather than applying the common law embodied in the statute that Congress wrote" to staunch the influx of cases it had caused.[78]

Scalia's response may seem bizarre considering his originalist interpretations[79] but is unsurprising when compared to his opinions in

71. Crawford-El v. Britton, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting).

72. Baude, *supra* note 12, at 63. Baude adopts another term to refer to the equilibrium-adjustment theory: the two-wrongs-make-a-right theory. *Id.* at 62. Equilibrium adjustment has also been alternatively termed "compensating adjustments" by several scholars. *See, e.g.*, Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 421 (2003) (stating "that multiple departures from the optimal or first-best constitutional arrangements might offset each other, producing compensating adjustments that ensure constitutional equilibrium").

73. Crawford-El, 523 U.S. at 611.

74. *Id.*

75. Monroe v. Pape, 365 U.S. 167 (1961). *See supra* text accompanying notes 25–30 for a discussion regarding the Court's decision in *Monroe*. Scalia agreed with the dissent in *Monroe* that "under color of" meant § 1983 applied only to violations pursuant to state law. Crawford-El, 523 U.S. at 611 (Scalia, J., dissenting).

76. *Id.*

77. *Id.*

78. *Id.* at 611–12.

79. *But see* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921 (2017) ("Justice Scalia famously described himself as a 'faint-hearted originalist' who would

Bivens cases.[80] Scalia believed that "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action[,]" but because of *Bivens*'s importance and long-standing application, he thought *Bivens* should be applied narrowly instead of overturned.[81] In the same way that Scalia believed *Bivens* should stand, he believed qualified immunity's departure from the common law was acceptable to fix the Court's earlier miscues that were heavily relied upon.

D. Lenity and Fair Warning

The Court has also justified qualified immunity by invoking the doctrine of lenity. The doctrine of lenity is predominately confined to criminal proceedings,[82] but the Supreme Court has equated the doctrines of lenity and fair warning to qualified immunity.[83] This thread begins with a criminal statute passed by the Reconstruction Congress in 1866 that is comparable to § 1983. 18 U.S.C. § 242 makes anyone acting "under color of any law, statute, ordinance, regulation, or custom" who "willfully subjects any person in any State . . . to the deprivations of any rights, privileges, or immunities secured by the Constitution or laws of the United States" criminally liable.[84]

Before the Court ever applied qualified immunity, it tackled the vagueness question of § 242. In *Screws v. United States*, a plurality on the Court narrowly defined § 242 to avoid vagueness principles.[85] The Court

abandon the historical meaning when following it was intolerable.").

80. Baude, *supra* note 12, at 63. *Bivens* created a federal equivalent of § 1983 actions. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). *Bivens* actions are entirely judicially created, while § 1983 was statutorily enacted.

81. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). Justice Scalia seems to have won the battle that *Bivens* should be narrowly limited. The Court has since declared that "it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017).

82. Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 511–12 (2002) (calling the lenity doctrine "one of the oldest and most 'venerable' canons of statutory interpretation" in criminal law).

83. Baude, *supra* note 12, at 71.

84. 18 U.S.C. § 242 (2017).

85. Screws v. United States, 325 U.S. 91, 100 (1945) (plurality opinion) ("[If § 242] is confined more narrowly . . . it can be preserved as one of the sanctions to the great rights which the Fourteenth Amendment was designed to secure."). Although Justice Douglas's opinion was only joined by a plurality, subsequent cases have adopted his opinion as controlling. Baude, *supra* note 12, at 71; *see also, e.g.*, United States v. Lanier, 520 U.S. 259, 267 (1997).

first construed "willful" acts as only those when officials act with "specific intent" while being "aware that what he does is precisely that which the statue forbids."[86] Thus, the Court stated that for officials to be liable, the rights within the meaning of § 242 must be "made definite by decision or other rule of law."[87] But in construing "under color of," the Court relatively quickly and without much discussion allowed the statute to apply where a state official violated state law.[88]

While it might be expected that the Court's fair warning and lenity analysis would be confined to the criminal statute § 242, it has, at times, extended the same reasoning to § 1983 cases and qualified-immunity defenses. In *United States v. Lanier*, a § 242 case, the Court reasoned that "the qualified immunity test is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes."[89] And again, in the § 1983 case *Hope v. Pelzer*,[90] the Court explicitly stated that "[o]fficers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242."[91]

E. Stare Decisis

The doctrine of stare decisis places a heavy emphasis on precedent and requires courts to "follow earlier judicial decisions when the same points arise again."[92] But the Court does not hold unswervingly to the doctrine when there are sufficiently persuasive reasons to depart from past decisions.[93] Stare decisis, however, is given greater weight when the Court engages in statutory interpretation, as opposed to constitutional interpretation.[94]

86. Screws, 325 U.S. at 104 (plurality opinion).
87. *Id.* at 103. This language shadows the "clearly established rights" principle in § 1983 qualified-immunity cases. *See, e.g.*, White v. Pauly, 137 S. Ct. 548, 552 (2017) (stating that officials are not liable under § 1983 when they have not "violate[d] clearly established statutory or constitutional rights").
88. Screws, 325 U.S. at 108–09.
89. Lanier, 520 U.S. at 270–71.
90. Hope v. Pelzer, 536 U.S. 730 (2002).
91. *Id.* at 739.
92. *Stare decisis*, BLACK'S LAW DICTIONARY (5th pocket ed. 2016).
93. Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U.L. REV. 789, 790 (2018).
94. Nielson & Walker, *supra* note 11, at 1856.

The Supreme Court has adopted this heightened form of stare decisis when interpreting statutes because a statutory interpretation "effectively become[s] part of the statutory scheme, . . . [and is subject] to congressional change. Absent special justification, they are balls tossed into Congress's court."[95] The Court has also noted that when Congress has had opportunities to reverse the Court's interpretation but has not done so, the force of statutory stare decisis is even stronger.[96] Since the Court enacted the modern, objective-based qualified-immunity regime in *Harlow* almost four decades ago,[97] Congress has amended § 1983 and added qualified immunity in several other sections of the United States Code.[98]

Furthermore, the Court does not evaluate policy concerns when statutory stare decisis is raised.[99] For example, in the context of statutory stare decisis, the Court has declined to overrule a statutory interpretation when presented with economic analysis even though the Court saw "no error in [the] analysis."[100] The Court instead believes that when such policy issues are at stake, "Congress is the right entity to fix it."[101]

Finally, while the Court may be wary of changing qualified immunity's substantive jurisprudence because it is based in the statutory interpretation of § 1983, the Court is less concerned with altering qualified immunity's procedural requirements.[102] In fact, the Court has already freely changed the procedures of qualified immunity several times—most notably in *Harlow* and *Pearson*.[103]

95. Kimble v. Marvel Entm'tEnt., LLC, 576 U.S. 446, 456 (2015).
96. *Id.* at 456. At the same time, the Court is sometimes wary of assigning meaning to Congressional inaction because of the harm it may pose to the separation of powers. Matthew Baker, *The Sound of Congressional Silence: Judicial Distortion of the Legislative-Executive Balance of Power*, 2009 B.Y.U.L. Rev. 225, 251 (2009) ("Due to the delicate nature of judicial responsibility in this area, courts should refrain whenever possible from giving positive meaning to congressional inaction.").
97. *Cf.* Watson v. United States, 552 U.S. 74, 82–83 (2011) (reasoning that when Congress had acquiesced to the Court's statutory interpretation for only fourteen years, the Court's interpretation had great stare-decisis force).
98. Nielson & Walker, *supra* note 11, at 1858.
99. *Id.* at 1876.
100. Kimble, 576 U.S. at 461.
101. *Id.* at 462.
102. Nielson & Walker, *supra* note 11, at 1860.
103. Pearson v. Callahan, 555 U.S. 223, 233–34 (2009) (stating that stare decisis has no bearing when a procedural "rule is judge made and implicates an important matter involving internal Judicial Branch operations. Any change should come from this Court, not Congress").

II. ANALYSIS/PROPOSAL

A. Monroe v. Pape Decision

The Court's 1961 decision in *Monroe* altered the understanding of § 1983 that had prevailed for the ninety years after the statute's enactment. Section 1983 has, as Scalia noted, "pour[ed] into the federal courts tens of thousands of suits each year."[104] In 1961, there were only 296 civil-rights cases brought in federal court; that number rose to 35,307 by 2013.[105] The Court's expansive interpretation in *Monroe* knocked over the first domino in a long line of unfortunate decisions that has led to modern qualified immunity's extensive application.

The *Monroe* majority relied heavily on § 1983's legislative history to determine the scope of "under color of."[106] The Court determined Congress had three purposes when it enacted § 1983: (1) to override state laws depriving citizens of their rights,[107] (2) to provide a remedy when state law was legally inadequate, and (3) to provide a federal remedy when a state remedy was inadequate in practice even if it was adequate in theory.[108]

This third purpose was the Court's driving point, but the Court's solution leapfrogged adequate-in-practice state remedies and allowed all suits directly into federal court. After quoting a litany of legislative history that the Court claimed showed § 1983 should be read broadly, the majority epitomized its selection of debate quotes with one by Senator Thurman.

104. Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting); *cf.* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 994 (7th ed. 2015) ("But the overall number of civil rights actions has risen markedly [since *Monroe*], with § 1983 cases accounting for a large if uncertain percentage of the increase.").

105. FALLON ET AL., *supra* note 104.

106. Monroe v. Pape, 365 U.S. 167, 170 (1961).

107. Here, the Court quoted Senator Sloss from Alabama. *Id.* at 173. Although Sloss's comment supports this point, it also cuts against the Court's third claim that the federal courts would be allowed to provide a remedy when the state remedy was inadequate in practice. The statute's language seemingly did not cause Sloss to believe that the federal courts would have primary jurisdiction when a state official violated state law:

> [Section 1983] prohibits any invidious legislation by States against the rights or privileges of citizens of the United States. The object of this section is not very clear, as it is not pretended by its advocates on this floor that any State has passed any laws endangering the rights or privileges of the colored people.

Id. at 173.

108. *Id.* at 174.

Senator Thurman stated that § 1983 "authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever as to the amount in controversy."[109] This supposedly proved Congress's intent to allow suits against officials even when they acted in violation of state law.

The majority also relied on its construction of § 1983's criminal-law counterpart. Twenty years before *Monroe* was decided and seventy years after § 1983 was enacted, the Court held that "under color of" in the criminal provision 18 U.S.C. § 242 applied to any "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[110] This meant that any government actor, whether or not they were acting pursuant to a state law, could be tried in federal court.[111] The Court reasoned that the same construction must be given to both § 1983 and § 242.[112]

Justice Frankfurter, in dissent, argued that § 1983's plain language, litigation history, and legislative history failed to support the majority's construction. Frankfurter explained that for the first seventy years after § 1983's enactment, "under color of" was read to require a depriver of rights to be acting in accordance with state laws or customs that had the force of law.[113] During that time, no § 1983 case had come before the Supreme Court arguing that "under color of" state law applied to any state official's action, and in only two suits in the lower courts was that broad application argued.[114] Decided only three years after § 1983 was enacted, one of these lower-court cases, *United States v. Jackson*, held that for state officials to be acting "under color of some [state] law, statute, order or custom," they must be acting "within the provisions of the state law."[115] The *Monroe* Court engaged in a "revolutionary turnabout" from the historical understanding of

109. *Id.* at 179–80.
110. *Id.* at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).
111. *Id.*
112. *Id.* at 185 ("[I]t is beyond doubt that this phrase should be accorded the same construction in both statutes . . . .").
113. *Id.* at 213–16 (Frankfurter, J., dissenting).
114. *Id.*
115. United States v. Jackson, 26 F. Cas. 563, 564 (C.C.D. Cal. 1874). In the other case, § 1983 was held to not apply "to instances of lawless police brutality, although the ruling was not put on 'under color' grounds." Monroe, 365 U.S. at 214–15 (Frankfurter, J., dissenting) (citing Brawner v. Irvin, 169 F. 964 (C.C.N.D. Ga. 1909)).

"under color of" when it had interpreted § 242.[116]

Frankfurter also denied that the § 242 precedents were applicable because the Court had only passingly considered the meaning of "under color of."[117] He counseled that "under color of" should be examined in a new light with a renewed emphasis on the legislative history, even while acknowledging that stare decisis might be implicated.[118] Before analyzing the legislative history of § 1983, Frankfurter made a final appeal to set aside stare decisis because the precedent's construction of "under color of" "ignores the meaning fairly comported by the words of the text and confirmed by the legislative history."[119]

Frankfurter contended that the legislative history pointed in the opposite direction of the majority's position. For example, Senator Edmunds stated that § 1983 gives federal protection when there are "any offenses against a citizen in a State . . . 'unless the criminal who shall commit those offenses is punished and the person who suffers receives that redress.'"[120] This implies that if a state properly punished an official for violating an individual's rights under state law, then there would be no federal cause of action.[121] Representative Garfield also supported the bill as it would "preserve intact the autonomy of the States, the machinery of the State governments, and the municipal organizations established under State law."[122] But under the majority's construction of "under color of", state governments no longer have primary authority, except the residuary power

116. Monroe, 365 U.S. at 217 (Frankfurter, J., dissenting).
117. *Id.* at 220–21.
118. *Id.* at 221.
119. *Id.* at 223. *See* SAM GLUCKSBERG, UNDERSTANDING FIGURATIVE LANGUAGE 97 (2001) for a study showing that almost all lay citizens understand "under color of law" in plain language as Frankfurter suggests.
120. Monroe, 365 U.S. at 228–29 (Frankfurter, J., dissenting) (quoting CONG. GLOBE, 42nd Cong., 1st Sess. 697 (1871) (statement of Sen. Edmunds)).
121. Justice Gorsuch argued similarly in a pair of cases while sitting on the Tenth Circuit Court of Appeals, urging that federal courts should sometimes abstain from ruling on § 1983 claims when state law adequately protects the plaintiff: "[W]hile *Monroe v. Pape* has read [federal courts'] authorization broadly, the authority to remedy a claim doesn't always mean the duty to do so." Browder v. City of Albuquerque, 787 F.3d 1076, 1083 (10th Cir. 2015) (Gorusch, J., concurring) (citations omitted). He further explained that "when a rogue state official acting in defiance of state law causes a constitutional injury there's every reason to suppose an established state tort law remedy would do as much as a novel federal remedy might and no reason exists to duplicate the effort." *Id.* at 1084 (citing Parratt v. Taylor, 451 U.S. 527, 543–44 (1981)). Abstaining when state law protects plaintiffs is proper "out of respect for considerations of judicial modesty, efficiency, federalism, and comity." Cordova v. City of Albuquerque, 816 F.3d 645, 664 (10th Cir. 2016) (Gorsuch, J., concurring).
122. *Id.* at 229.

to hear federal claims. This was contrary to the intentions of at least two members of Congress who supported the law.[123]

The legislative history, however, was more ambiguous than either the dissent or majority conceded.[124] The legislative history should not have been conclusive in either direction, as Justice Harlan, concurring with the majority, pointed out. Harlan took a more tempered approach and relied on stare decisis.[125] Although the Court had already construed "under color of" in § 242, the language of § 242 and § 1983 are almost identical. Additionally, the meaning of § 242 was decided twenty years before *Monroe*—not an insignificant length of time for precedent to cement. Harlan took the appropriate approach and applied stare decisis to § 1983. Even though Frankfurter's interpretation of "under color of" was correct, stare decisis should apply since the doctrine is especially powerful in statutory interpretation because Congress can fix any flaws it sees with the Court's interpretation.[126]

It has been almost a century since *Monroe*'s misinterpretation. Now, the ball is in Congress's court to rebuff the Court's error. Congress should amend § 1983 to overrule *Monroe* and adopt Justice Frankfurter's interpretation by making "under color of" state law apply only to cases where a state official is acting pursuant to unconstitutional state laws, not where state officials are acting ultra vires. This will result in (1) a return to a more appropriate federal-state balance by slowing the flow of § 1983 suits when suits could appropriately be brought under state law in a state court and (2) a stronger reliance on state common-law defenses instead of federal qualified immunity when suits are brought in state court.

One argument against this approach is that trial juries and judges at the state level may not protect an individual's rights as well as federal courts would.[127] While this argument might seem persuasive, it doesn't hold water.

123. But one must be careful from inferring much from Congressional intent because there is no single purpose driving every member of Congress. *See generally* Kenneth A. Shepsle, *Congress is a "They," not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (explaining that there is no overarching Congressional intent, only individual Congress members' preferences).

124. Monroe, 365 U.S. at 193 (Harlan, J., concurring).

125. *Id.* at 192.

126. *See supra* text accompanying notes 92–96.

127. E.g., an African American in Mississippi during the early 1900s is lynched by whites. Even if lynchings were technically illegal in the state, white juries may rarely pass judgment on the white defendants—if the case even made it to trial. Thus, the lynchings would be de facto legal under state law.

Section 1983 not only applies when state officials act "under color of any statute" but also to state officials acting "under color of any . . . custom, or usage, of any State."[128] Thus, § 1983 would still allow plaintiffs to sue in federal courts when the state official's action is technically against state law but the conduct is "engaged in 'permanently and as a rule,' or 'systematically,'" so that it has the force of law.[129] Under this interpretation, if state jury outcomes systematically deprive an individual's rights, that deprivation would be a state custom or usage, and the individual could bring suit under § 1983.[130] In other words, plaintiffs could sue in federal court if a state remedy is inadequate in practice, even if adequate in theory.

And if more cases are brought in state courts under violations of state law, instead of under § 1983, courts will be free to apply state common-law defenses instead of the judicially created qualified immunity. This approach will not impede the Court's practical concerns—holding public officials accountable versus shielding them from harassment, distraction, and liability—because state officials will presumably be more aware of their state's laws than they would be of unclear and unestablished constitutional rights.

B. Harlow v. Fitzgerald

Modern qualified immunity has drifted far from its common-law moorings. In *Harlow v. Fitzgerald*, the Court established a new standard for applying qualified immunity.[131] In *Harlow*, the Court held that officials were protected by qualified immunity as long "as their conduct does not

128. 42 U.S.C. § 1983 (2017).

129. Monroe, 365 U.S. at 236 (Frankfurter, J., dissenting); *see also* Browder v. City of Albuquerque, 787 F.3d 1076, 1084 (10th Cir. 2015) (Gorsuch, J., concurring) (explaining that although federal courts should abstain from § 1983 cases more often, if a state is "maintaining facially adequate law on the books but acting discriminatorily in practice, the federal court must hear the case").

130. *See also* Rutherglen, *supra* note 30, at 976–77 (arguing that "'custom' and 'usage'" should be viewed as it is "in other areas of law: that official policy combines with private practice to determine how the law actually operates"). Furthermore, this interpretation does not cause the statute to have superfluous language. Under the *Monroe* majority's interpretation, Congress's specified categories of state action (i.e., "under color of any statute, ordinance, regulation, custom, or usage") mean little. The *Monroe* majority's reinterpretation of § 1983 could just has easily have read: "Every [state official] who . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thererof to the deprivation of any rights . . . ." No "under color of" needed. The *Monroe* Court, by subsuming all state officials' actions regardless of its legality within the state, removed all meaning from Congress's express language.

131. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

violate clearly established [law] . . . of which a reasonable person would have known."[132] This change greatly expanded qualified immunity's reach from what it had been—a common-law good-faith defense only.

The Court should return to the common-law good-faith qualified immunity. Qualified immunity would thus be unavailable when "an official '*knew or reasonably should have known* that the action he took . . . would violate the constitutional rights of the [plaintiff], *or* if he took the action *with malicious intention* to cause a deprivation of constitutional rights or other injury . . . .'"[133] Qualified immunity would then only be available when both of the following are true: (1) the official had no knowledge or reason to know his action would deprive a person of rights and (2) the official had no intent to deprive a person of rights.

But the Court did not leave the common law behind without thought. The Court held that good-faith qualified immunity was incompatible with policy considerations required to balance the need to hold officials accountable and shield them from frivolous suits.[134] It has identified five costs of litigation: financial liability, distracting officials from their duties, inhibiting discretionary action, deterring people from public service, and burdensome discovery costs.[135]

These concerns, while valid, would have far less weight if Congress restored the original meaning of § 1983.[136] If Congress restored the state-federal balance that existed before *Monroe*, there would be far fewer § 1983 cases and less need for the federal courts to protect officials from the costs the Court identified. Fewer suits means less financial costs, fewer distractions from duties, fewer inhibitions of discretion, less deterrence of people seeking public office, and less discovery costs. To be sure, more cases would "requir[e] resolution by a jury"[137] than modern qualified immunity requires, but a return to good-faith qualified immunity would restore the balance between holding officials accountable and protecting them from burdensome litigation.

---

132. *Id.* at 818.
133. *Id.* at 815 (alteration in original) (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).
134. *Id.* at 816; *see also supra* text accompanying notes 45–53. Presumably, the Court has had to give greater weight to protection because of the influx of § 1983 cases after *Monroe*.
135. *See supra* Section I.A.
136. Although returning to a good-faith qualified immunity that is rooted in the common law is the proper course regardless of Congress's action or inaction, I will focus on the effects of overturning *Harlow* assuming that Congress restores § 1983 to its original meaning.
137. Harlow, 457 U.S. at 816.

On the other hand, the financial cost to individual officials may increase. In § 1983 actions, officials rarely pay out of pocket for judgments against them.[138] Under a good-faith qualified immunity, officials would be less likely to be indemnified because there is a greater focus on subjective motives. In many jurisdictions, the governing law does not allow indemnification of officials who act in bad faith.[139] Since overturning *Harlow* would make good faith a threshold question to granting qualified immunity, more juries may determine that officials did not act in good faith. Then, the official would not be indemnified and would be personally liable for damages. But only bad actors would be personally liable, so the financial costs against the officials would be justified. Officials who did not act in bad faith would still be indemnified.

Returning to the pre-*Harlow* qualified immunity will not topple the Court's balancing act between holding officials accountable and shielding them from frivolous suits. In fact, good-faith qualified immunity would restore the proper balance Congress intended when it passed § 1983.[140]

Additionally, Scalia's *Crawford-El* equilibrium-adjustment argument, which contends that the Supreme Court was right to incorrectly interpret qualified immunity because *Monroe* was incorrect, would be void. Still assuming Congress returns § 1983 to its original meaning, the statute would again resemble what Congress passed in 1871. Thus, it would be appropriate to apply the "normal common-law rules"[141] and return to the pre-*Harlow* good-faith qualified immunity that was more squarely based in the common law. The Court would no longer have to engage "in the essentially legislative activity of crafting a sensible scheme of qualified immunit[y]"[142] because there would no longer be a need to right the wrong of *Monroe*.

138. Schwartz, *Police Indemnification*, *supra* note 46.
139. *Id.* at 920–21.
140. *See* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020), for five predictions about what litigation would look like with no qualified immunity, instead of a good-faith qualified immunity: (1) clarified constitutional rights, (2) litigation success rates consistent with modern qualified-immunity levels, (3) decreased litigation costs, (4) more suits filed, and (5) limited impact on law enforcement decision-making. Although based on the abolition of qualified immunity, Schwartz's predictions are also applicable to this Note's analysis.
141. Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).
142. *Id.* at 611–12.

CONCLUSION

The current "yes harm, no foul" imbalance leaves victims violated but not vindicated; wrongs are not righted, wrongdoers are not reproached, and those wronged are not redressed.[143]

There should be some change to the judicial system's application of qualified immunity for state officials because "[i]t is indeed curious how qualified immunity excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations."[144] The best way to curb the expansive defense is to reinstate the original applicability of § 1983 and returning to a common-law understanding of qualified immunity. This one-two punch will preserve the Court's goal of keeping officials accountable while protecting officials from burdensome litigation, and it will better serve justice for those whose rights have been violated.

Remember Andrew Lee Scott? If qualified immunity was as it was intended to be, the officer who shot and killed Andrew and who was at the wrong house without a search warrant would not have evaded liability so easily. First, the case likely would not have been brought in federal court under § 1983 but in state court under Florida law. The officer would thus have been unable to assert qualified immunity as a defense and would have had only Florida defenses available, just like any other defendant. Second, even if the case could have been brought under § 1983, the officer would have had to prove the more rigorous, pre-*Harlow* qualified immunity standard instead of showing there was no clearly established law that prohibited him from his dubious warrantless search.

Although for Andrew and his family the time has passed to restore the qualified-immunity balance, there is still time for those whose rights have not yet been violated. Congress and the Supreme Court should reevaluate modern qualified immunity in search of a better solution

143. Zadeh v. Robinson, 902 F.3d 483, 499 (2018) (Willet, J., concurring dubitante).
144. *Id.*